United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

77-2141

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FOR THE SECOND CIRCUIT

Docket No. 77-2141

JAMES TRACY, WILLIAM ADAMS, ROBERT ARNOLD, ARTHUR BETSCH, SANTOS CEPEDA, DOUGLAS COLEMAN, HAROLD GONZALEZ, LENNELL HOWARD, ELLIOT HUNT, BILLY LITTLE, LARRY MOORE, ROBERT OAKLEY, EMANUAL ORDINE, JR., LARRY PLEASANT, GEORGE REED, ANTHONY REPETTI, CORDELL ROBINSON, WILLIAM RODRIGUEZ, DENNIS SOARES, MICHAEL THOMAS, and JOHN TURRISI, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

- against -

DOMINICK SALAMACK, Superintendent, Bayview Correctional Facility; CAPTAIN HYLAN T. SPERBECK Correction Officer, Bayview Correctional Facility; BENJAMIN WARD, Commissioner, Department of Correctional Services, State of New York,

Defendants-Appellants.

MAR 21 1977

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

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ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

Preliminary Statement

This is a petition for rehearing with suggestion for rehearing en banc of this Court's decision of March 7, 1978 which affirmed as modified the order of the United States

District Court (Lasker, D.J.) enjoining the defendants from removing members of plaintiffs' class from participation in New York's temporary release program.

Statement of the Case

On July 13, 1977, New York's statutes governing the temporary release program were amended primarily for the purpose of tightening the eligibility requirements for participation in the program (N.Y. Corr. Law § 851[2] McKinney Supp. 1977-1978).* The application of the new eligibility requirements resulted in the disqualification of 140 inmates who were already participating in the program. Since the revocations were due to a change in law and not as a result of the inmates' misbehavior, no hearings were given to the inmates before their revocation.**

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* The amendment to the eligibility requirements was necessitated by the alarming increase in crimes committed by inmates on the temporary release program. See McKinney's Session Laws of New York, September, 1977, No. 8, Albany Letter, pp. 7-8.

** A Superintendent's Proceeding which complies with the guidelines set forth in Wolff v. McDonnell, 418 U.S. 539 (1974) is provided to inmates who face removal from the temporary release program for disciplinary reasons. See 7 New York Code of Rules and Regulations Part 253, et seq.

The District Court in its decision dated October 14, 1977 found that the prisoners had an "entitlement" in the temporary release program and had suffered a "grievous loss" of a liberty interest by their revocation. The Court, in granting plaintiffs' motion for a preliminary injunction and ordering reinstatement, held that the prisoner's revocation could not occur without a due process hearing. The Court also delineated the circumstances under which removal would be proper after a hearing, authorizing revocation only when based on additional new facts or previously unknown facts indicating that the inmate was a risk to the safety of the community. The District Court's order had the effect of infringing upon the State's authority to modify its law regarding the eligibility of prisoners already participating in the program.

After affirming that portion of the District Court's order requiring a due process hearing before an inmate is revoked from the program, this Court reasoned that the constraints imposed by the court below upon the defendants' authority to remove inmates from the program were too rigid. This Court, therefore, expanded the considerations which would authorize revocation of participation rights to include a reevaluation by the Commissioner of each inmate's eligibility based on his eligibility for parole, his past institutional record, the

particular circumstances underlying the violent offense for which he is under sentence, and his previous temporary release record. (See slip op. 1933-1934)*

This Court concluded its opinion by stating "[w]hat is required is the commissioner's independent, good faith evaluation - a reviewable exercise of discretion - to take place following a Morrissey v. Brewer Due Process hearing which must be accompanied by a written statement of reasons under Wolff v. McDonnell ...." (footnote omitted) (Slip op. 1934) However, in its modification of the District Court's preliminary injunction, the Court stated:

> "....any inmate alleged to be a security risk under such circumstances shall be restored to the temporary release program unless within 20 days from the filing of this order the charges against him are heard and determined in accordance with the requirements for hearings at correctional institutions set forth in Wolff v. McDonnell, 418 U.S. 539 (1974)." (Slip op. 1935)

* The defendants still maintain that the Court erred in requiring due process hearings as a result of a change in law. The 140 inmates were revoked due to the amendment of the eligibility requirements. Since the State Legislature has the undisputed power to make substantive changes in its laws, plaintiffs cannot insist upon their continuation in the program on the same terms and conditions under which they were initially found eligible. To permit the inmates to remain in the program would effectively block the implementation of new legislation. See cf. Richardson v. Belcher, 404 U.S. 78, 80 (1971); Lavine v. Milne, 424 U.S. 577 (1976); Rasmussen v. Toia, 420 F. Supp. 757 (S.D.N.Y. 1976) (three-judge court).

Thus, there is a discrepancy between the text of this Court's opinion and its modification of the order below. While ordering the defendants to provide a Wolff hearing to any of the plaintiff class members alleged to be a security risk, this Court at the same time has stated that what is required is the Commissioner's evaluation of the inmates after a Morrissey hearing.* This apparent contradiction in the Court's opinion will result in endless confusion over the true intent of the Court's opinion. It is incumbent upon this Court to eliminate the discrepancy by clearly indicating that, under the circumstances here, only a Wolff hearing is required when an inmate is removed from the temporary release program.

* The District Court in its memorandum dated October 14, 1977 intentionally left unanswered the scope of due process appropriate under the circumstances herein, but in its order of November 7, 1977 did order a hearing in accordance with Wolff v. McDonnell, 418 U.S. 539 (1974) be given to plaintiff class members.

ARGUMENT

THE DUE PROCESS HEARING ACCORDED A PRISONER BEING REMOVED FROM THE TEMPORARY RELEASE PROGRAM SHOULD BE CONDUCTED IN ACCORDANCE WITH THE PROCEDURES OUTLINED IN WOLFF V. McDONNELL.

It is well settled that once the Court determines that due process applies to a particular situation, it must next decide how much process is due. Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Wolff v. McDonnell, supra; Frost v. Weinberger, 515 F. 2d 56, 66 (2d Cir. 1975). Due Process only mandates such procedural safeguards as the particular situation demands. See Morrissey v. Brewer, supra at 481. As Judge Friendly has eloquently stated:

> "The required degree of procedural safeguards varies directly with the importance of the private interest affected and the need for the usefulness of the particular safeguard in the given circumstances and inversely with the burden and any other adverse consequences of affording it." Friendly, "Some Kind of Hearing", 123 U. Pa. L. Rev. 1267, 1278 (1975).

The decision of this Court applying Morrissey procedures to temporary release revocation hearings is repugnant to the principles enunciated by the Supreme Court in both Morrissey v. Brewer, supra and Wolff v. McDonnell, supra. It is respectfully

submitted that this Court has misconstrued the mandate of those cases by applying the broader Morrissey procedures* to a situation never envisioned by the Supreme Court and by elevating the inmate's interest at a temporary release revocation hearing to that of an inmate at a parole revocation hearing. The inmate's interest in a temporary release program is radically different than a parolee's interest in remaining on parole and, therefore, different due process requirements must apply to each revocation hearing. Schumate v. People of the State of New York, 373 F. Supp. 1166 (S.D.N.Y. 1974).

While an inmate in a temporary release program may leave the correctional facility for up to fourteen hours a day to work or attend school, he is, nonetheless, an inmate subject to all the same rules and regulations of the facility as any other inmate confined 24 hours a day. See N.Y. Corr. Law

* The basic distinctions between Morrissey and Wolff procedures are as follows: (1) a parolee has an unqualified right to present witnesses and documentary evidence while an inmate can do so only when not unduly hazardous to institutional safety or correctional goals; (2) a parolee has a right to confront and cross-examine adverse witnesses unless the hearing officer finds good cause for not allowing confrontation while an inmate has no right to cross-examine or confront adverse witnesses; and (3) a parolee has the right to counsel where he makes a timely and colorable claim that he has not committed the act with which he is charged or there are substantial and complex reasons in mitigation of the act while an inmate who is illiterate or presented with a complex issue is allowed the help of a fellow inmate or a member of the institutional staff.

§§ 851 (3) and (7). The inmate's privilege to go into the community is strictly guarded by requiring him to travel only certain routes to his destination, permitting him to visit only specified places and requiring him to return at a fixed time. N.Y. Corr. Law §§ 855(5), (6) and (7). The parolee, on the other hand, is not under the severe restrants imposed upon the inmate and is comparatively free to work, live and travel where he chooses. The distinction between confinement in prison and parole and the accompanying differences in procedural rights was recognized by the Court in Morrissey v. Brewer, supra at 482 and Wolff v. McDonnell, supra at 560-561.

The grave concern expressed by the Court in Wolff, supra at 562 and reiterated in Baxter v. Palmigiano, 425 U.S. 308, 314-315 (1976) that a full expansion of Morrissey procedural rights in a prison context would jeopardize the security of the institution and exacerbate the friction between inmates and inmates and guards was overlooked by this Court. As the Supreme Court explained in Wolff, the institution must be free to exercise its sound discretion as to whether an inmate should be allowed to call or cross-examine witnesses where it "may create a risk of reprisal or undermine authority." 418 U.S. at 566-569; see also Williams v. Ward, 556 F. 2d 1143, 1156-1157 (2d Cir. 1977); Cardaropoli v. Norton, 523 F. 2d 990, 998 (2d Cir. 1975).

Whether the due process hearing is conducted as a result of an inmate's misbehavior or to revoke him from the temporary release program, the possibility of threats, reprisals or other hazards to the inmates and institutional safety is still present. By applying Morrissey to work release revocation hearings, the Court is encasing these hearings in "an inflexible constitutional straitjacket." Wolff, supra at 563.

Moreover, the application of Morrissey procedures to a work release revocation hearing would deprive the institution of its discretion to control the hearing as found necessary by the Court in Wolff. The Supreme Court has well established that the courts should not entangle themselves in discretionary matters within the expertise of correctional authorities. See Jones v. North Carolina Prisoners' Labor Union, Inc., ____ U.S. ____, 97 S. Ct. 2532, 2538 (1977); Meachum v. Fano, 427 U.S. 215, 229 (1976); Preiser v. Rodriquez, 411 U.S. 475, 491-492 (1973); Cruz v. Beto, 405 U.S. 319, 321 (1972); Johnson v. Avery, 393 U.S. 483, 486 (1969). Clearly, maintaining the security of the institution is one of the most crucial matters within the discretion of correctional authorities.

In view of the large number of inmates participating in the temporary release program and the unprecedented extension by this Court of Morrissey procedures to a hearing analogous to

a disciplinary proceeding controlled by Wolff, it is respectfully submitted that this issue merits reconsideration by this Court or consideration by this Court en banc. The expansion of Morrissey rights to Wolff matters is an issue of the utmost importance and is at variance with prior decisions of this Court and the Supreme Court in similar situations.

CONCLUSION

THE PETITION FOR REHEARING OR REHEARING EN BANC SHOULD BE GRANTED.

Dated: New York, New York
March 20, 1978

Respectfully submitted,

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STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

Valerie MOntera , being duly sworn, deposes and says that She is employed in the office of the Attorney General of the State of New York, attorney for Defendants-Appellants herein. On che 20 day of March , 1978 , s he served the annexed upon the following named person :

SUSAN N. HERMAN, ESQ.
Prisoners' Legal Services of New York
100 Church Street
New YOrk, New York 10007

Attorney in the within entitled proceeding by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by her for that purpose.

Valerie Montera

Sworn to before me this
20 day of March , 1978

Kenneth McKay
Assistant Attorney General
of the State of New York